

Laurence A. Weiss (Bar No. 164638)  
Laurence.Weiss@hellerehrman.com  
HELLER EHRMAN LLP  
275 Middlefield Road  
Menlo Park, CA 94025-3506  
Telephone: 650.324.7000  
Facsimile: 650.324.0638

David B. Weinberg (D.C. Bar # 186247)  
dweinberg@wileyrein.com  
Eric Andreas (D.C. Bar # 462777)  
eandreas@wileyrein.com  
David E. Markert (D.C. Bar #502486)  
dmarkert@wileyrein.com  
WILEY REIN LLP  
1776 K Street NW  
Washington, DC 20006  
Telephone: 202.719.7000  
Facsimile: 202.719.7049

Attorneys for Intervenor-Defendant  
Dow AgroSciences LLC

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

UNITED FARM WORKERS, AFL-CIO,  
et al.,

Plaintiffs,

v.

ADMINISTRATOR,  
UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant.

Case No. C 07-03950 JF

**NOTICE OF MOTION, MOTION TO  
INTERVENE, AND MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION**

Date: Friday, February 1, 2008

Time: 9:00 AM

Courtroom 3, 5th Floor

The Honorable Jeremy Fogel

MOTION TO INTERVENE AND  
SUPPORTING MEMORANDUM  
C 07-03950 JF

**TABLE OF CONTENTS**

|   |    |
|---|----|
| NOTICE TO PLAINTIFFS, DEFENDANT, AND THEIR ATTORNEYS OF RECORD .....        | 1  |
| POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE .....              | 2  |
| STATEMENT OF THE ISSUES.....  | 2  |
| RELEVANT FACTS .....  | 3  |
| ARGUMENT .....  | 5  |
| I.    INTERVENTION AS OF RIGHT SHOULD BE GRANTED .....                      | 5  |
| A.    This Motion To Intervene Is Timely.....                               | 5  |
| B.    DAS Has Significantly Protectable Interests In This Case .....        | 6  |
| C.    Disposition Of This Case May Affect DAS' Interests.....               | 8  |
| D.    The Existing Parties Do Not Adequately Represent DAS' Interests ..... | 8  |
| II.    PERMISSIVE INTERVENTION SHOULD BE GRANTED .....                      | 10 |
| CONCLUSION .....  | 11 |

# TABLE OF AUTHORITIES

## CASES

|   |          |
|---|----------|
| <u>Animal Protection Institute v. Martin,</u>                               |          |
| 241 F.R.D. 66 (D. Me. 2007).....  | 7        |
| <u>Cemex, Inc. v. County of Los Angeles,</u>                                |          |
| 92 F. A'ppx 457 (9th Cir. 2004).....  | 5        |
| <u>Dimond v. District of Columbia,</u>                                      |          |
| 792 F.2d 179 (D.C. Cir. 1986).....  | 9        |
| <u>Forest Conservation Council v. United States Forest Service,</u>         |          |
| 66 F.3d 1489 (9th Cir. 1995) .....  | 6, 9     |
| <u>Fund for Animals v. Norton,</u>  |          |
| 322 F.3d 728 (D.C. Cir. 2003).....  | 9        |
| <u>Kootenai Tribe of Idaho v. Veneman,</u>                                  |          |
| 313 F.3d 1094 (9th Cir. 2002) .....   | 10, 11   |
| <u>Nader v. Ray,</u>  |          |
| 363 F. Supp. 946 (D.D.C. 1973).....   | 7        |
| <u>Natural Resources Defense Council v. Costle,</u>                         |          |
| 561 F.2d 904 (D.C. Cir. 1977).....  | 9        |
| <u>Natural Resources Defense Council v. EPA,</u>                            |          |
| 99 F.R.D. 607 (D.D.C. 1983) .....   | 6, 9, 10 |
| <u>Northwest Forest Resource Council v. Glickman,</u>                       |          |
| 82 F.3d 825 (9th Cir. 1996) .....   | 7        |
| <u>People for the Ethical Treatment of Animals v. Babbitt,</u>              |          |
| 151 F.R.D. 6 (D.D.C. 1993) .....  | 7        |
| <u>Sierra Club v. EPA,</u>  |          |
| 995 F.2d 1478 (9th Cir. 1993) .....   | 7        |
| <u>Sierra Club v. Espy,</u>   |          |
| 18 F.3d 1202 (5th Cir. 1994) .....  | 5        |
| <u>Siskiyou Regional Education Project v. United States Forest Service,</u> |          |
| No. Civ. 03-3013-CO, 2003 WL 23976354 (D. Or. June 16, 2003).....           | 6        |
| <u>Southwest Center for Biological Diversity v. Berg,</u>                   |          |
| 268 F.3d 810 (9th Cir. 2001) .....  | 5, 8     |
| <u>Trbovich v. United Mine Workers of America,</u>                          |          |
| 404 U.S. 528 (1972) .....   | 8        |

|   |   |      |
|---|---|------|
| 1 | <u>United States v. Alisal Water Corp.,</u> |      |
|   | 370 F.3d 915 (9th Cir. 2004) .....          | 5, 6 |
| 2 | <u>United States v. Lauer,</u>              |      |
| 3 | 242 F.R.D. 184, 186 (D. Conn. 2007) .....   | 6    |
| 4 | <u>United States v. Oregon,</u>             |      |
|   | 745 F.2d 550 (9th Cir. 1984) .....          | 5    |

## FEDERAL STATUTES

|    |                         |      |
|----|-------------------------|------|
| 7  | 5 U.S.C. § 551 .....    | 6    |
| 8  | 7 U.S.C. § 136 .....    | 3    |
| 9  | 7 U.S.C. § 136a .....   | 3    |
| 10 | 7 U.S.C. § 136a-1 ..... | 2, 3 |
| 11 | 7 U.S.C. § 136d .....   | 2    |

## MISCELLANEOUS

|    |  |          |
|----|--|----------|
| 14 | Charles Alan Wright & Arthur R. Miller,            |          |
| 15 | FEDERAL PRACTICE AND PROCEDURE § 1916 (1972) ..... | 5        |
| 16 | Fed. R. Civ. P. 24(a) .....                        | 5, 6, 10 |
| 17 | Fed. R. Civ. P. 24(b) .....                        | 10       |

**NOTICE TO PLAINTIFFS, DEFENDANT, AND THEIR ATTORNEYS OF RECORD**

**PLEASE TAKE NOTICE** that on Friday, February 1, 2008, at 9:00 AM, or as soon thereafter as the matter may be heard, in Courtroom 3 of the United States Courthouse located at 280 South 1<sup>st</sup> Street, Fifth Floor, San Jose, California, Applicant Dow AgroSciences LLC ("DAS") will and does hereby move the Court to grant it intervention under Rules 24(a)(2) and 24(b)(2) of the Federal Rules of Civil Procedure.

By this motion, DAS seeks an Order from this Court granting DAS intervention as a defendant in this case. DAS has an absolute right to intervene as a defendant because it has a substantial interest in chlorpyrifos, the pesticide that is the subject of this case, and that interest is not adequately represented by the existing parties. DAS is the primary manufacturer and defender of technical-grade chlorpyrifos and holds a registration for the pesticide as required by the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"). Thus, DAS would be directly and adversely affected by a ruling in the Plaintiffs' favor that the Defendant, the United States Environmental Protection Agency, violated FIFRA in reregistering certain chlorpyrifos uses. For these same reasons, DAS also has a permissive right to intervene in this case.

Counsel for Plaintiffs have informed DAS that Plaintiffs do not consent to this motion. Counsel for Defendant has informed DAS that Defendant takes no position on this motion.

DATED: December 12, 2007

HELLER EHRMAN LLP

David B. Weinberg (D.C. Bar # 186247)  
 dweinberg@wileyrein.com  
 Eric Andreas (D.C. Bar # 462777)  
 eandreas@wileyrein.com  
 David E. Markert (D.C. Bar #502486)  
 dmarkert@wileyrein.com  
 WILEY REIN LLP  
 1776 K Street NW  
 Washington, DC 20006  
 Telephone: 202.719.7000  
 Facsimile: 202.719.7049

By: /s/ Laurence A. Weiss  
 Laurence A. Weiss  
 Laurence.Weiss@hellerehrman.com  
 HELLER EHRMAN LLP  
 275 Middlefield Road  
 Menlo Park, CA 94025-3506  
 Telephone: 650.324.7000  
 Facsimile: 650.324.0638

Attorneys for Intervenor-Defendant Dow AgroSciences LLC

1                   **POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO INTERVENE**

2                   **STATEMENT OF THE ISSUES**

3           The present action arises from the September, 2001, issuance of the United States  
4   Environmental Protection Agency's ("EPA" or "the Agency") Interim Reregistration Eligibility  
5   Decision ("IREDD") for chlorpyrifos.<sup>1</sup> IREDDs are the end result of a lengthy reregistration process  
6   that EPA is required to undertake for all pesticides first registered before November 1, 1984. *See*  
7   Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") § 4, 7 U.S.C. § 136a-1. EPA  
8   concluded in its IREDD for chlorpyrifos that there was sufficient information on the human health  
9   and ecological effects of chlorpyrifos to support the continued use of products containing the  
10   pesticide. In the IREDD, the Agency also identified additional studies of chlorpyrifos' risks to  
11   human health and the environment that it required be conducted by the pesticide's registered  
12   manufacturers.

13           Plaintiffs here ask this Court to declare that EPA acted arbitrarily, capriciously, and  
14   contrary to law when it approved reregistration of chlorpyrifos for continued use in agricultural  
15   applications. Plaintiffs also ask this Court to issue an injunction ordering EPA to make a new  
16   reregistration eligibility decision for chlorpyrifos.

17           Resolution of the Plaintiffs' claims will have a direct, immediate, and substantial impact  
18   on the ability of Dow AgroSciences LLC ("DAS") to market and sell its chlorpyrifos products  
19   and on DAS' investment in studies currently being performed for purposes of complying with the  
20   2001 IREDD. Furthermore, if this Court were to require EPA to make a new reregistration  
21   eligibility decision for chlorpyrifos, DAS would be obliged to participate in that proceeding, and  
22   the end result could be more burdensome restrictions on the uses of DAS' chlorpyrifos-containing  
23   products or the initiation of proceedings to suspend or cancel them. *See* FIFRA § 6, 7 U.S.C. §  
24   136d. Either of these outcomes would have a significant and adverse impact on the future sales  
25   of DAS' chlorpyrifos-containing products.

26           Accordingly, DAS requests that the Court determine that it may intervene in this action,

27  
28           <sup>1</sup>       The IREDD for chlorpyrifos is available on EPA's website. *See* EPA, Pesticide Reregistration Status,  
[http://www.epa.gov/pesticides/reregistration/status\\_page\\_c.htm](http://www.epa.gov/pesticides/reregistration/status_page_c.htm) (last visited Dec. 7, 2007).

1 either as of right or permissively, so that it may defend both the 2001 IRED and its registrations  
2 for chlorpyrifos.

### 3 RELEVANT FACTS

4 EPA regulates the manufacture, distribution, and sale of pesticide products pursuant to the  
5 authorities set forth in FIFRA. Under FIFRA, a company may lawfully distribute or sell only  
6 those pesticide products that have been “registered” for specific uses by EPA. 7 U.S.C. §  
7 136a(a). For a pesticide to be registered, the EPA Administrator must determine, among other  
8 things, that it “will perform its intended function without unreasonable adverse effects on the  
9 environment.” *Id.* § 136a(c)(5)(C).

10 In 1988, Congress amended FIFRA to require the reregistration by EPA of all products  
11 containing active ingredients that had been registered prior to November 1, 1984. *Id.* § 136a-  
12 1(a).<sup>2</sup> These amendments established a five-phase process for EPA to follow. *Id.* § 136a-1(b). In  
13 Phase One, the Agency was to determine and list which pesticides are to be reregistered. Phase  
14 Two required EPA to identify the missing or inadequate data supporting those registrations.  
15 During Phase Three, the registrants of the listed pesticides were required to submit summaries of  
16 existing studies, flag studies indicating adverse effects, and commit to submit additional data as  
17 needed. EPA reviewed these submissions in Phase Four and required registrants to meet any  
18 unfulfilled data requirements. Last, in Phase Five, EPA performed a detailed review of all data  
19 submitted for a pesticide and determined whether that pesticide could be used without  
20 unreasonable adverse effects on people or the environment, taking into account the costs and  
21 benefits of the pesticide’s uses. *See id.* §§ 136(bb), 136a(c)(5)(C), 136a-1(g)(2)(C).

22 As it has implemented this reregistration program, EPA has documented its evaluations in  
23 IREDs or final Reregistration Eligibility Decisions (“REDs”). In either case, when the Agency  
24 releases an IRED it typically accepts public comment on that document.

25 Chlorpyrifos is an insecticide, acaricide, and miticide that was discovered by The Dow  
26 Chemical Company in 1962, and first registered for use in the United States in 1965. Today,

27 <sup>2</sup> Pesticides for which the Agency made certain determinations between November 1984 and October 1988  
28 are excepted from this “reregistration” requirement. 7 U.S.C. § 136a-1(a). During the relevant time period, EPA  
made no such determinations for chlorpyrifos. Thus, chlorpyrifos is not excepted from the reregistration process.



1 Dow AgroSciences LLC, a wholly-owned subsidiary of The Dow Chemical Company, is the  
2 world's primary manufacturer, distributor, and seller of pesticide products containing  
3 chlorpyrifos. These products are used by farmers in the United States and 97 other countries to  
4 defend more than 50 different crops against attack by foliage and soil-borne insect pests.

5 Due to the widespread use of chlorpyrifos, its health and safety risks have been  
6 extensively examined and re-examined by numerous governmental regulatory bodies, including  
7 EPA. Millions of dollars have been spent in the past four decades on over 3,600 studies of the  
8 potential impact of chlorpyrifos-containing products on human health and the environment. Most  
9 of these studies were conducted and funded by DAS, in some cases with contributions from other  
10 registrants, and DAS continually updates the studies' results with data generated using the newest  
11 testing technologies. DAS also operates an exceptional product stewardship program that  
12 supports and advises customers on chlorpyrifos application techniques that minimize risks to  
13 people or the environment.

14 As noted above, the IRED for chlorpyrifos was issued in September 2001. In the IRED,  
15 EPA determined that chlorpyrifos was eligible for reregistration for agricultural uses.<sup>3</sup> However,  
16 EPA made its reregistration determination contingent upon an assessment of the cumulative risk  
17 posed by all organophosphate pesticides (of which chlorpyrifos is an example). EPA completed  
18 that assessment in July, 2006. Shortly thereafter, the Agency finalized the IRED for chlorpyrifos,  
19 concluding that the cumulative risks did not require reconsideration of its prior reregistration  
20 decision.

21 This case challenges EPA's chlorpyrifos decision. Plaintiffs allege that the Agency lacked  
22 sufficient data to find that the continued use of chlorpyrifos-containing products met statutory  
23 standards for safety. Plaintiffs also allege that EPA did not properly balance the risks and  
24 benefits of chlorpyrifos uses.

25  
26  
27 <sup>3</sup> Prior to the issuance of the chlorpyrifos IRED, DAS and other technical registrants entered into agreements  
28 with EPA to voluntarily cancel or phase out nearly all residential uses of the pesticide. The 2001 IRED for  
chlorpyrifos, therefore, does not analyze the risks for those uses that were phased out and/or canceled.



## ARGUMENT

### I. INTERVENTION AS OF RIGHT SHOULD BE GRANTED

Under Federal Rule of Civil Procedure 24(a)(2), a third party is entitled to intervene as of right in a case if four conditions are met: (1) the motion for intervention is timely; (2) the third party claims an identifiable, “significantly protectable interest” relating to the property or transaction that is the subject of the action; (3) disposition of the action may impair or impede the third party’s ability to protect that interest; and (4) the existing parties to the action may inadequately represent the third party’s interest. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817 (9th Cir. 2001). This four-part test is to be construed “liberally in favor of applicants for intervention.” *Cemex, Inc. v. County of Los Angeles*, 92 F. A’ppx 457, 459 (9th Cir. 2004); *see also Berg*, 268 F.3d at 818. DAS readily satisfies all four conditions and should be granted intervention as of right in this case.

#### A. This Motion To Intervene Is Timely

The submission of this motion to intervene is timely. In determining whether a motion is timely, District Courts in the Ninth Circuit are to look to the following three factors: “(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.” *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Of the three factors, the issue of prejudice to the original parties is generally considered the most important. *See United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) (quoting Charles Alan Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE* § 1916 (1972)); *see also Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (“The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties.”).

The instant case is at a very early stage of litigation. The Plaintiffs filed their complaint on August 1, 2007, and EPA filed its Answer on October 1, 2007. In mid-October, the Plaintiffs filed an amended complaint which EPA answered in early November. The Plaintiffs and Defendants filed a Joint Case Management Statement on November 7, on the basis of which the Court apparently continued the originally scheduled case management conference for November

1 16, 2007 until February 22, 2008. A Motion from Plaintiffs to Compel Filing of A Complete  
 2 Administrative Record is currently pending, but has not been fully briefed or noticed. Under the  
 3 proposed schedule embodied in the Joint Case Management Statement, the record itself would not  
 4 be filed until April and dispositive briefing would not occur until the summer of 2008.

5 Under these circumstances, neither the Plaintiffs nor EPA will be prejudiced by the timing  
 6 of DAS' motion to intervene. Thus, the first condition for intervention as of right is met. *See*,  
 7 *e.g.*, *United States v. Lauer*, 242 F.R.D. 184, 186 (D. Conn. 2007); *Siskiyou Reg'l Educ. Project*  
 8 *v. United States Forest Serv.*, No. Civ. 03-3013-CO, 2003 WL 23976354, at \*4 (D. Or. June 16,  
 9 2003).

#### 10 **B. DAS Has Significantly Protectable Interests In This Case**

11 The second condition for intervention as of right is that the proposed intervenor claims a  
 12 significantly protectable interest relating to the property or subject of the action. A proposed  
 13 intervenor claims a significantly protectable interest within the meaning of Rule 24(a)(2) if the  
 14 interest asserted is protected by law and related to the plaintiff's claims. *Alisal Water Corp.*, 370  
 15 F.3d at 919. An economic interest may support intervention as of right, if it is concrete and  
 16 related to the underlying subject matter of the case. *See id.* at 919; *see also Forest Conservation*  
 17 *Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995) (stating that the interest  
 18 requirement assists in "dispos[ing] of lawsuits by involving as many apparently concerned  
 19 persons as is compatible with efficiency and due process").

20 This condition is satisfied here. As confirmed by the appended Affidavit of Michael  
 21 Shaw, DAS is the creator and predominant manufacturer of chlorpyrifos and holds several EPA  
 22 registrations that allows it to distribute and sell chlorpyrifos products. Under the Administrative  
 23 Procedure Act, DAS' registrations are considered licenses that are protected by law. 5 U.S.C. §  
 24 551(8) ("license" includes "the whole or a part of an agency permit, certificate, approval,  
 25 registration . . . or other form of permission"). Such a license is a significantly protectable  
 26 property interest for purposes of determining a third party's right to intervene in an action. *See*,  
 27 *e.g.*, *Natural Res. Def. Council v. EPA*, 99 F.R.D. 607, 609 (D.D.C. 1983) ("Plaintiffs' complaint  
 28 challenges procedures pursuant to which EPA reached preliminary decisions that the intervenors'

1 pesticide products merited continued registration. If plaintiffs succeed in this case, these  
2 regulatory decisions . . . will be set aside. Thus, the intervenors can be said to have a substantial  
3 and direct interest in the subject of this litigation.”); *Sierra Club v. EPA*, 995 F.2d 1478, 1485-86  
4 (9th Cir. 1993) (ruling that holder of discharge permits under the Clean Water Act had a  
5 “protectable” interest and could intervene as of right where the litigation could result in  
6 modifications to those permits); *Animal Prot. Inst. v. Martin*, 241 F.R.D. 66 (D. Me. 2007)  
7 (granting intervention as of right to licensed fur trappers where plaintiffs sought to enjoin state  
8 agency from issuing licenses); *Nader v. Ray*, 363 F. Supp. 946, 953 (D.D.C. 1973) (granting  
9 intervention as of right to holders of nuclear facility operating licenses issued by the Atomic  
10 Energy Commission where the licenses would have been revoked or suspended if the plaintiffs  
11 prevailed).

12 DAS also has an economic interest in this case that supports granting it intervention as of  
13 right. DAS enjoys economic benefits – profits and enhancement of its commercial reputation – as  
14 one of the few companies that holds registrations to distribute and sell chlorpyrifos. If the  
15 Plaintiffs prevail in this case, those economic benefits could be lessened or even eliminated. This  
16 is clearly a sufficient interest, directly related to the subject of this action, to support intervention  
17 as of right. *See, e.g., People for the Ethical Treatment of Animals v. Babbitt*, 151 F.R.D. 6  
18 (D.D.C. 1993).

19 Third, DAS’ participated actively in the five-phase reregistration process that culminated  
20 in the 2001 chlorpyrifos IRED. The Ninth Circuit has frequently approved intervention by  
21 entities that were “directly involved in the enactment of the law or in the administrative  
22 proceedings out of which the litigation arose.” *Nw. Forest Res. Council v. Glickman*, 82 F.3d  
23 825, 837-38 (9th Cir. 1996). The rationale for this practice is that these entities acquire a  
24 significantly protectable interest through their extensive involvement in the regulatory process.  
25 The same rationale extends to DAS, and the second criteria for intervention as of right thus is  
26 met.

1                   **C.       Disposition Of This Case May Affect DAS' Interests**

2           It is unquestionable that disposition of this action may, as a practical matter, impair or  
3   impede DAS' ability to protect its interests in chlorpyrifos. If the Plaintiffs obtain the re-review  
4   of the chlorpyrifos IRED that they seek, substantial burdens would be placed on DAS.  
5   Uncertainty about the future availability of chlorpyrifos products likely will lead potential  
6   customers to switch to substitutes. DAS also would be forced to incur additional cost to defend  
7   chlorpyrifos' safety.

8           Furthermore, the end result of EPA's re-review of the IRED could be the imposition of  
9   additional restrictions on the distribution or use of chlorpyrifos-containing products, or even a  
10   total ban on the sale of such products. Needless to say, either result would impair the value of  
11   DAS' registrations for chlorpyrifos, cause substantial sales losses, and nullify much of DAS'  
12   investment in the hundreds of studies that enabled it to obtain and maintain its registrations.  
13   Alternatively, EPA could reregister chlorpyrifos on the condition that DAS conduct more studies  
14   on the pesticide's safety. Depending on the number and types of studies EPA required, the cost  
15   of meeting such a condition on reregistration may be so great that DAS would have no choice but  
16   to cancel or narrow its registrations.

17           In short, the disposition of this action will "as a practical matter impair or impede" DAS'  
18   ability to protect its interests in chlorpyrifos. Therefore, the third element of the Ninth Circuit's  
19   four-part test for intervention of right is satisfied.

20                   **D.       The Existing Parties Do Not Adequately Represent DAS' Interests**

21           The final condition for intervention as of right is that the representation of a proposed  
22   intervenor's interests by the existing parties "may be" inadequate. The Supreme Court has stated  
23   that the burden of making a showing of inadequacy should be treated as "minimal." *Trbovich v.*  
24   *United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also Sw. Ctr. for Biological*  
25   *Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001).

26           The courts have recognized that governmental representation of the interests of private  
27   parties is often inadequate. Governmental agencies have a broad responsibility to represent the  
28   public interest, whereas private companies often have a more narrow and "parochial" financial

1 interest not shared by the public at large. *See, e.g., Forest Conservation Council v. United States*  
2 *Forest Serv.*, 66 F.3d 1489, 1498-99 (9th Cir. 1995); *Fund for Animals v. Norton*, 322 F.3d 728,  
3 736 (D.C. Cir. 2003).

4 Moreover, DAS routinely conducts extensive research on the pesticides it manufactures  
5 and thus has special expertise that makes it uniquely able to both defend chlorpyrifos' safety and  
6 to accurately delineate the pesticide's likely effects on human health and the environment.  
7 Furthermore, DAS has experience and knowledge in the complex business of supplying  
8 chlorpyrifos products which EPA does not have. *See Natural Res. Def. Council v. Costle*, 561  
9 F.2d 904, 912-13 (D.C. Cir. 1977). DAS thus "can reasonably be expected to contribute to the  
10 informed resolutions of these [technical and complex] questions when, and if, they arise before  
11 the District Court," and its participation in defense of the IRED will "serve as a vigorous and  
12 helpful supplement to EPA's defense." *Costle*, 561 F.2d at 912-13.

13 In addition, while DAS supports the chlorpyrifos IRED, DAS' interest in chlorpyrifos is  
14 different from that of EPA, and thus could lead DAS to take different positions from the Agency  
15 in litigation. DAS has focused, parochial financial interests in defending the chlorpyrifos IRED.  
16 In contrast, EPA would face a potential conflict of interest were it to represent both the general  
17 interests of U.S. citizens and the financial interests of DAS. The courts have found that this  
18 potential for conflict sufficient to meet the "minimal" burden of demonstrating inadequacy of  
19 representation. *See, e.g., Forest Conservation Council v. United States Forest Serv.*, 66 F.3d  
20 1489, 1499 (9th Cir. 1995) (finding proposed intervenors satisfied the minimal showing required  
21 for inadequacy of representation because, in part, "the government must present the broad public  
22 interest, not just the economic concerns of the [proposed intervenors]"); *Dimond v. District of*  
23 *Columbia*, 792 F.2d 179, 192-93 (D.C. Cir. 1986).

24 Indeed, in the particular context of pesticides regulation, the inadequacy standard is met  
25 even in cases where EPA and pesticide manufacturers appear to have interests that are directly  
26 aligned. *See Natural Res. Def. Council v. EPA*, 99 F.R.D. 607, 610 (D.D.C. 1983) (concerning  
27 regulatory reform measures for pesticides). This is because EPA's broader goal in challenges to  
28 its pesticides regulations is "defending [the] policies and procedures that it utilizes in regulating

1 many potential harmful substances . . . ,” while the manufacturer would have “interests [that] are  
2 more narrowly focused on proceedings relating to the particular pesticide [it] manufacture[s]” and  
3 thus will wish to maximize its opportunities to prove that its products are safe. *Id.* Thus, a time  
4 may come in this action when the interests of EPA and DAS diverge, and any purported EPA  
5 representation of DAS’s interests would become inadequate. *See id.* For example, EPA may  
6 desire to reach a settlement with the Plaintiffs that would severely restrict chlorpyrifos’ uses or  
7 even phase the pesticide out. DAS may not share the same goals.

8 For the foregoing reasons, DAS cannot rely on EPA to adequately protect its interests.  
9 Therefore, the fourth criterion for intervention as of right is met, and this Court should grant  
10 DAS’ motion.

## 11 II. PERMISSIVE INTERVENTION SHOULD BE GRANTED

12 Alternatively, DAS should be granted permissive intervention in this case. Federal Rule  
13 of Civil Procedure 24(b)(2) sets forth the standard that governs permissive intervention. Under  
14 Rule 24(b)(2), a third party seeking to intervene permissively must show: (1) that its application  
15 is timely; and (2) that its claim or defense and the main action have a question of law or fact in  
16 common. The Rule differs from Rule 24(a)(2) in that a “significant protectable interest” is not  
17 required for permissive intervention, nor is there a requirement that the proposed intervenor have  
18 a “direct personal or pecuniary interest” in the case. *See Kootenai Tribe of Idaho v. Veneman*,  
19 313 F.3d 1094, 1108 (9th Cir. 2002) (concerning attempt to intervene in two actions challenging  
20 United States Forest Service’s roadless area conservation rule).

21 DAS’ application for intervention meets Rule 24(b)(2)’s standard. As explained above,  
22 DAS’ motion to intervene is timely and will not result in any prejudice to the existing parties.  
23 Moreover, DAS is obviously affected by litigation that could result in significant changes to, or  
24 cancellation of, pesticide registrations that it holds. Also, as is clear from DAS’ proposed answer,  
25 DAS raises many questions of law and fact in its defense that also are material to the main action.

26 In *Kootenai Tribe*, the Ninth Circuit held that private environmental groups lacked the  
27 significant protectable interest necessary to intervene as of right. *Id.* at 1108. However, the Court  
28 affirmed the district court’s grant of permissive intervention, agreeing that “the magnitude of



[the] case is such that both Applicants' intervention will contribute to the equitable resolution of [the] case." *Id.* at 1111. This case also concerns issues that are large in magnitude. Chlorpyrifos is one of the most widely used insecticides in the United States and is particularly important to corn growers. Am. Compl. ¶¶ 18-19. Moreover, DAS generates substantial revenue from chlorpyrifos sales. Thus, the outcome of this case has potentially significant ramifications for the U.S. agricultural economy and for DAS. Consequently, DAS should be allowed to participate in this case.

### CONCLUSION

For the foregoing reasons, DAS respectfully requests that its Motion to Intervene be granted.

DATED: December 12, 2007

HELLER EHRMAN LLP

David B. Weinberg (D.C. Bar # 186247)  
 dweinberg@wileyrein.com  
 Eric Andreas (D.C. Bar # 462777)  
 eandreas@wileyrein.com  
 David E. Markert (D.C. Bar #502486)  
 dmarkert@wileyrein.com  
 WILEY REIN LLP  
 1776 K Street NW  
 Washington, DC 20006  
 Telephone: 202.719.7000  
 Facsimile: 202.719.7049

By: /s/ Laurence A. Weiss  
 Laurence A. Weiss  
 Laurence.Weiss@hellerehrman.com  
 HELLER EHRMAN LLP  
 275 Middlefield Road  
 Menlo Park, CA 94025-3506  
 Telephone: 650.324.7000  
 Facsimile: 650.324.0638

Attorneys for Intervenor-Defendant Dow AgroSciences LLC